No. 80-317

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL., PETITIONERS

v.

WALTER CAMENISCH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING L. GORNSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-317

THE UNIVERSITY OF TEXAS, ET AL., PETITIONERS

v.

WALTER CAMENISCH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The United States will discuss the question whether petitioners violated Section 504 of the Rehabilitation Act of 1973 by refusing to provide a sign-language interpreter to assist respondent in the "program or activity" in which he participated.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
A. Facts	2
B. Proceedings in the district court	3
C. The court of appeals decision	5
Summary of argument	7
Argument	9
I. Congress intended, and this Court has recognized, that in certain circumstances recipients of federal funds will need to expend funds in order to avoid discrimination against otherwise qualified handicapped persons in a federally financed program or activity	9
II. The Secretary of HEW has reasonably and consistently interpreted Section 504 to require recipients of federal funds to ensure the provision of auxiliary educational aids to otherwise qualified deaf students, irrespective, of the financial need of a particular student	19
Conclusion	32

TABLE OF AUTHORITIES

Cases:

American Trucking Assns. v. *United States*, 344 U.S. 298	24
Bowles v. *Seminole Rock Co.*, 325 U.S. 410	24
Cannon v. *University of Chicago*, 441 U.S. 677	5, 6, 32
Cherry v. *Mathews*, 419 F. Supp. 922	20
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555	24
Griggs v. *Duke Power Co.*, 401 U.S. 424	18, 25
Jones v. *Jeffers*, Civ. No. 79 C 5396 (N.D. Ill. Jan. 12, 1981)	27, 28

PREVIOUS PAGE WAS BLANK

Cases—Continued Page

Lau v. *Nichols*, 414 U.S. 563 ..... 8, 18, 24
Maine v. *Thiboutot*, No. 79-838 (June 25, 1980) 32
Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356 ..... 8, 24
Northern Indiana Public Service Co. v. *Porter County Chapter of the Izaak Walton League*, 432 U.S. 12 24
Southeastern Community College v. *Davis*, 442 U.S. 397 ..... *passim*
Thorpe v. *Housing Authority of Durham*, 393 U.S. 268 ..... 8, 24
Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 25
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 31
Udall v. *Tallman*, 380 U.S. 1 25
United States v. *Larionoff*, 431 U.S. 864 24

Constitution, statutes, and regulations:

United States Constitution:

Fourteenth Amendment, Equal Protection Clause 3

Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, 78 Stat. 252, 42 U.S.C. 2000d *et seq.* 8, 13, 18, 20

Section 601, 42 U.S.C. 2000d 18
Section 602, 42 U.S.C. 2000d-1 20

Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909, 29 U.S.C. (Supp. II) 801 *et seq.* 17

29 U.S.C. (Supp. II) 876(a)(1) 17
29 U.S.C. (Supp. II) 876(b) 17

Department of Education Organization Act, Pub. L. No. 96-88, Title III, 93 Stat. 677 *et seq.* 1

Rehabilitation Act of 1973, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955, 29 U.S.C. (Supp. II) 701 *et seq.*: ..... *passim*

Constitution, statutes, and regulations—Continued	Page
Section 101(a)(8), 29 U.S.C. 721(a)(8)	27
Section 114(3), 29 U.S.C. (Supp. II) 774(d)	15
Section 115(2), 29 U.S.C. (Supp. II) 775(a)	10, 14
Section 116(2), 29 U.S.C. (Supp. II) 777e	15
Section 118(e), 29 U.S.C. (Supp. II) 792(h)(1)	17
Section 504, 29 U.S.C. 794	*passim*
Section 504, 29 U.S.C. (Supp. II) 794	*passim*
Section 505(a)(2), 29 U.S.C. (Supp. II) 794(a)(2)	20
Section 120(a), 29 U.S.C. (Supp. II) 794b(3)	17
20 U.S.C. 1005a	28
20 U.S.C. 1070d-1(b)(3)	28
20 U.S.C. 1070d-1(b)(4)	28
20 U.S.C. 1133 *et seq.*	28
20 U.S.C. 1221d	28
20 U.S.C. 1424a	28
42 U.S.C. 1983	3, 17, 32
42 U.S.C. 2751 *et seq.*	28
34 C.F.R. 104 *et seq.*	1
45 C.F.R. 80.8	1
45 C.F.R. Part 84	1
Section 84.12(a)	21
Section 84.12(c)	21
Section 84.4(b)(1)(iii)	23
Section 84.4(b)(2)	23
Section 84.22(a)	21
Section 84.22(c)	22
Section 84.44(d)	*passim*
Section 84.44(d)(1)	22-23
Section 84.44(d)(2)	22
Section 84.52(d)(2)	22
Section 84.61	1
Appendix A:	
page 383	21
page 386	21-22
page 392	24, 26
45 C.F.R. Part 85	1

Miscellaneous: Page

117 Cong. Rec. 45974 (1971) 13, 14
118 Cong. Rec. (1972):
page 464 13
page 525 ..... 13, 14
page 526 13
page 1595 13
pages 4341-4342 13
page 9495 13
page 30390 13
page 32310 13
119 Cong. Rec. 18137 (1973) 13
124 Cong. Rec. (daily ed. Oct. 14, 1978):
page H13473 15-16
page H13474 17-18
page H13476 16
Department of Education, Office of Handicapped Concerns, *Auxiliary Aids: A Resource Guide for Postsecondary Schools, Rehabilitation Agencies and Handicapped Individuals* (1980) 28
Executive Order No. 11914, 41 Fed. Reg. 17871 (1976) 1, 2
Executive Order No. 12250, 45 Fed. Reg. 72995, 72997 (1980) 1, 2
39 Fed. Reg. 18582 (1974) 20
41 Fed. Reg. 20296 (1976) 20
41 Fed. Reg. 29548 (1976) 20
42 Fed. Reg. 22676 (1977) 20-21
HEW *Guide to the Section 504 Self-Evaluation for Colleges and Universities* (1978) 22, 27
HEW *Annual Report to the President and the Congress on Federal Activities Related to the Administration of the Rehabilitation Act of 1973* (1978) 27
H.R. 12154, 92d Cong., 1st Sess. (1971) 13
S. 3044, 92d Cong., 2d Sess. (1972) 13-14
S. Rep. No. 93-318, 93d Cong., 1st Sess. (1973) 18
S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974) 20

INTEREST OF THE UNITED STATES

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. (Supp. II) 794, prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance or * * * conducted by any Executive agency or by the United States Postal Service." The statute requires each executive agency to promulgate regulations governing enforcement of the antidiscrimination provisions within the federal government. In addition, the United States has substantial responsibility for implementing Section 504 in connection with federally funded programs conducted by private institutions and state and local governments. Executive Order No. 11914, 41 Fed. Reg. 17871 (1976), directed the Secretary of Health, Education, and Welfare to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of [S]ection 504." In response to this command, the Secretary issued detailed regulations. See 45 C.F.R. Parts 84 and 85.[1] Under the Secretary's regulations, federal grant agencies that detect actual or threatened violations of Section 504 may refer the matter to the Department of Justice with a recommendation that appropriate judicial proceedings be brought to enforce the rights of the United States under the statute. See 45 C.F.R. 84.61 and 45 C.F.R. 80.8. Executive Order No. 12250, 45 Fed. Reg. 72995 (1980), transferred from the Secretary to the Attorney General the responsibility for coordinating the implementation and enforcement of Section 504 by Executive Branch agencies. The Order provided that

[1] With respect to federally funded educational institutions, HEW's enforcement responsibility was transferred to the Department of Education by the Department of Education Organization Act, Pub. L. No. 96-88, Title III, 93 Stat. 677 *et seq.* HEW's regulations, as applicable to educational institutions, were recodified, without significant change, at 34 C.F.R. 104 *et seq.* Because petitioners continue to refer to HEW and its regulations, we do the same.

the regulations on this subject previously issued by the Secretary under Executive Order No. 11914 "shall be deemed to have been issued by the Attorney General * * * and shall continue in effect until revoked or modified by the Attorney General." 45 Fed. Reg. at 72997.

This case concerns the interpretation of the antidiscrimination provisions in Section 504. The Court's decision may also affect the validity of the administrative construction given the statute in HEW's regulations. Because the regulations and the statute directly affect the actions of all federal agencies and all recipients of federal funds, the United States participated in this case as amicus curiae in the court of appeals. For the same reason, the United States participated as amicus curiae in this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), an earlier case involving the application of Section 504. Finally, in response to the district court's decision in this case, respondent filed an administrative complaint with HEW alleging that petitioners' refusal to provide an interpreter violated Section 504. After an investigation, HEW found that petitioners had indeed violated Section 504 and its implementing regulations (App., *infra*, 9a-16a). Upon its creation, the Department of Education (ED) assumed responsibility for completing the processing of the complaint. ED recently stayed further administrative proceedings pending this Court's decision (App., *infra*, 17a-18a). ED therefore has a direct interest in the outcome of this case.

STATEMENT

A. Facts

Respondent Walter Camenisch is deaf (A. 30). Sometime before the fall of 1977, he was appointed Acting Dean of Students at the Texas School for the Deaf (A. 31). To obtain a permanent appointment to that position, respondent needed a master's degree (*ibid.*). For this reason, respondent enrolled in graduate school at the University of Texas, a state-supported institution of higher education (A. 30-31).

Respondent met all the academic and technical standards established by the University for admission to, and participation in, its graduate program (A. 30). Because he is deaf, however, he could not participate effectively in the classroom portion of the educational program without the assistance of a sign-language interpreter (A. 31). Respondent therefore asked the University to provide him with a sign-language interpreter to assist him in his classes (*ibid.*). The University refused this request (A. 31-32). It explained that its policy was to provide services of this kind only to those students meeting its financial aid standards. Respondent did not qualify for financial aid, even when the expense of an interpreter was added to respondent's other expenses (A. 31, 33-34, 40).

Unable to obtain the assistance of the University, respondent was forced to secure an interpreter at his own expense.[2] In all, respondent paid an interpreter $1,245 for assisting him in nine courses (A. 32).

B. Proceedings in the district court

In March 1978, respondent filed suit against the University and several university officials (A. 1, 4-8). He alleged that petitioners' failure to provide him with a sign-language interpreter violated Section 504 of the Rehabilitation Act of 1973 and the Equal Protection Clause of the Fourteenth Amendment (A. 6-7). His complaint, which sought only declaratory and injunctive relief, asserted causes of action under Section 504 and under 42 U.S.C. 1983 (A. 4-8).

On the same day on which he filed suit, respondent moved for a preliminary injunction (A. 1, 16-17). At the hearing on this motion, respondent testified that he needed one further course in order to complete the requirements for his master's degree, that he intended to take this course

---

[2] Respondent also unsuccessfully sought assistance from the Texas Rehabilitation Commission (A. 12). The Rehabilitation Commission denied assistance on the ground that respondent did not have a substantial employment handicap (*ibid.*).

during the summer of 1978, and that he would need a sign-language interpreter to complete the course successfully (A. 49-51). Respondent's counsel read to the district court the stipulations of fact summarized above (A. 45-48). In addition, the parties stipulated that the University annually receives more than $31,000,000 in federal financial assistance and that, as a condition of receiving that assistance, the University has agreed to comply with Section 504 of the Rehabilitation Act of 1973 (A. 48). The parties also stipulated that the University's budget for the year ending August 31, 1978 exceeded $200,000,000 (*ibid.*).

Petitioners did not introduce any evidence. They contended that because respondent did not meet the University's financial aid criteria, the University's only obligation under Section 504 and its accompanying regulations was to permit him to bring a sign-language interpreter into his classes and that the University had satisfied this obligation. Petitioners also argued that respondent was not entitled to relief because he had not filed a complaint with HEW (A. 56-57).

The district court granted respondent's request for a preliminary injunction and ordered petitioners "to procure an interpreter or other effective method of making orally delivered course materials available to [respondent] during his completion of his Master's work" (Pet. App. A-22). The court based its decision on the "substantial likelihood that [respondent would] ultimately prevail on the merits[,] * * * the relative costs to the parties, the public interest, * * * and the potential irreparable injury resulting from [respondent's] loss of employment" (Pet. App. A-21).

The court rejected petitioners' argument that respondent should be required to exhaust administrative remedies before obtaining preliminary relief. The court observed that "HEW regulations contain no provisions for providing emergency relief of the nature requested by [respondent]" and concluded therefore that "exhaustion procedures are meaningless with respect to [respondent]" (Pet. App. A-20 to A-21). Nonetheless, "as a condition

of preliminary injunctive relief," the court ordered respondent "to initiate a complaint with HEW" requesting the same relief sought in his lawsuit. The court stayed further judicial proceedings "pending a final administrative determination on the merits" (Pet. App. A-22). As an additional condition of injunctive relief, the court directed respondent to post a security bond guaranteeing petitioners' reimbursement in the event they ultimately prevail on the merits (*ibid.*).

C. The court of appeals decision

The court of appeals affirmed the district court's order granting preliminary injunctive relief but vacated that part of the order requiring respondent to file an administrative complaint with HEW (Pet. App. A-2). The court of appeals agreed with the district court's determinations that respondent would suffer irreparable injury in the absence of preliminary relief and that the posting of a security bond would protect petitioners from permanent harm (Pet. App. A-4 to A-5). The court also agreed that respondent was likely to succeed on the merits and that the public interest favored the granting of preliminary relief (Pet. App. A-5 to A-11).

The court ruled that Section 504 implicitly authorizes private litigation to enforce the statutes' antidiscrimination provisions. Rejecting petitioner's argument that the promulgation of regulations governing administrative enforcement of Section 504 deprived private parties of whatever independent litigating authority they may previously have enjoyed, the court of appeals noted that, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court found a private right of action under Title IX of the Education Amendments of 1972, despite the availability of administrative enforcement procedures identical to those provided for the enforcement of Section 504 (Pet. App. A-8 to A-9). The court of appeals concluded that *Cannon* "implicitly rejected the argument that these * * * procedures militate[] against the finding of a private right of action under Section 504" (Pet. App. A-9).

With respect to the substantive content of Section 504, the court of appeals was not persuaded by petitioners' argument that the decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), undermined the basis for the award of preliminary relief to respondent. In the court's view, *Davis* "was clearly not intended to bar relief under this statute for all handicapped people in the future" (Pet. App. A-10). The court of appeals stressed this Court's explicit recognition that a refusal to accommodate the needs of a disabled person can, in some instances, amount to discrimination against the handicapped and that HEW has an important responsibility in identifying those situations in which such illegal discrimination occurs (*ibid.*). The court distinguished the present case from *Davis* in two ways. First, the court said, "HEW regulations require institutions to provide services in their academic programs to accommodate the handicapped, including the provision of * * * sign language interpreters," whereas, in *Davis*, the applicable regulations "did not require the sort of 'individual attention' services that Mrs. Davis required to get through nursing school" (*ibid.*). Secondly, the court observed, while Davis's handicap precluded her "from ever realizing the principal benefits of the training" she sought, respondent "can obviously perform well in his profession" (Pet. App. A-11).

The court of appeals held that the district court correctly granted preliminary injunctive relief without requiring respondent first to exhaust administrative remedies. The court of appeals did not rely, however, on the absence of any provision for emergency relief in the HEW regulations. Rather, the court concluded that exhaustion of administrative remedies is simply not a prerequisite for private litigation under Section 504. Following *Cannon*, the court determined that an exhaustion requirement would be inappropriate because the administrative enforcement scheme established by HEW's regulations does not permit a private person to participate in the administrative investigation and resolution of a

complaint he has filed and because the funding termination remedy that the agency may impose at the end of that process does not guarantee individual relief for the aggrieved party (Pet. App. A-14 to A-16). The court of appeals therefore vacated that part of the district court's order requiring respondent to file an administrative complaint as a condition of obtaining preliminary injunctive relief.[3]

SUMMARY OF ARGUMENT

I

In enacting Section 504 of the Rehabilitation Act of 1973 and the subsequent amendments to that statute, Congress expected and intended that recipients of federal funds would sometimes need to spend money in order to accommodate qualified handicapped persons and permit their participation in federally funded programs and activities. This Court recognized that general proposition in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.10, 412-413 (1979), and it should not be rejected now. Acceptance of petitioners' argument that Section 504 imposes no financial obligations whatever on institutions receiving federal aid would seriously diminish the effectiveness of Section 504 in accomplishing its goal of improving educational and other opportunities available to qualified handicapped persons. Moreover, petitioners' proposed statutory interpretation is contrary to the pre-enactment history of Section 504, to subsequent

---

[3] The court noted that, since the district court's decision, respondent has completed his master's degree and HEW has issued a letter finding petitioners in violation of Section 504 (Pet. App. A-3 n.3, A-5). The court concluded that neither of these events makes the controversy moot. The fact that respondent has already received the relief he requested does not make the case moot, the court explained, because respondent has posted a bond that can be used to repay petitioners if they ultimately prevail on the merits (Pet. App. A-5). The court concluded that the letter of findings does not render the case moot because a private suit is independent of administrative proceedings and therefore "stands by itself" (Pet. App. A-6 n.5).

legislative action concerning the handicapped, and to this Court's ruling in *Lau* v. *Nichols*, 414 U.S. 563 (1974), under a statute analogous to Section 504—Title VI of the Civil Rights Act of 1964.

II

As petitioners apparently now concede, the regulations promulgated by the Secretary of HEW under Section 504 required the University of Texas to provide respondent with a sign-language interpreter to assist him in the master's degree program in which he was enrolled. These regulations are designed to assist only qualified handicapped persons, and they were issued, under congressional authority, with a full appreciation of the need to avoid imposition of undue financial and administrative burdens on recipients of federal funds. See *Southeastern Community College* v. *Davis*, *supra*, 442 U.S. at 412. The Secretary reasonably anticipated that the obligations imposed on recipients of federal funds by the so-called auxiliary aid regulation, 45 C.F.R. 84.44(d), could ordinarily be met through reliance on public agencies, private charitable organizations, or student volunteers. In any event, the requirements established by the regulation have not been shown to be unduly burdensome in this case, and it appears certain that the cost of providing sign-language interpreters to qualified deaf students who need them represents but a small fraction of the annual federal aid received by the University of Texas. Under such circumstances, it cannot be said that the challenged regulation is not "reasonably related to the purposes of the enabling legislation," and the Secretary's method of implementing the statutory command should therefore be sustained. *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 280-281 (1969); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

ARGUMENT

I

CONGRESS INTENDED, AND THIS COURT HAS RECOGNIZED, THAT IN CERTAIN CIRCUMSTANCES RECIPIENTS OF FEDERAL FUNDS WILL NEED TO EXPEND FUNDS IN ORDER TO AVOID DISCRIMINATION AGAINST OTHERWISE QUALIFIED HANDICAPPED PERSONS IN A FEDERALLY FINANCED PROGRAM OR ACTIVITY

The government's principal concern in this case is to defend and reaffirm a fundamental proposition recognized by this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.10, 412-413 (1979), namely, that, on some occasions, the antidiscrimination provisions in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, require recipients of federal funds to spend money in order to accommodate handicapped persons and permit their participation in federally funded programs and activities. Petitioners now attempt to justify their refusal to provide a sign-language interpreter for respondent on the broad ground that "Section 504 does not require a covered institution to expend monies to make programs accessible" (Pet. Br. 5). This argument is inconsistent with the congressional understanding of Section 504 and with this Court's interpretation of the statute in *Davis*.

In *Davis*, this Court expressly acknowledged that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory" (442 U.S. at 412-413). Moreover, the Court recognized that HEW has "an important responsibility" to identify "those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped," in violation of Section 504 (442 U.S. at 413). In particular, the Court pointed to the statutory authorization for federal grants to finance "such information and technical assistance (including support personnel such as interpreters for the deaf) as may be

necessary to assist [recipients of federal funds] in complying with * * * the requirements of section 504" (442 U.S. at 411 n.10, quoting 29 U.S.C. (Supp. II) 775(a)). The Court concluded from this statutory language that "on occasion the elimination of discrimination might involve some costs" (*ibid.*).

Petitioners' insistence that Section 504 "was not, and is not, intended to impose financial obligations on the states or state institutions" (Pet. Br. 8) flies in the face of this Court's interpretation of the statute in *Davis*. Petitioners have not always embraced such an extreme position. In the district court, they argued only that Section 504 does not preclude the University of Texas from applying its usual financial need criteria in evaluating respondent's request for a sign-language interpreter (A. 57-58), not that Section 504 imposes no financial obligation on recipients of federal funds. Petitioners did not challenge any of HEW's regulations under Section 504; they merely contended that, in respondent's case, the University had fulfilled its obligation to "take such steps as are necessary to insure" that an otherwise qualified handicapped student is not excluded from participation in a federally funded educational program (A. 57). See 45 C.F.R. 84.44(d).[4]

This position was repeated and developed further in a January 1979 letter from petitioner Lorene Rogers, the President of the University of Texas, to HEW's Office of Civil Rights in Dallas (App., *infra*, 1a-5a). The letter was the University's response to HEW's invitation to comment on the administrative complaint filed by respondent as a condition of the preliminary injunctive relief ordered by the district court. Referring to Section

[4] In September 1978, when petitioners filed their brief on appeal in the Fifth Circuit, they alluded to the substantive argument made in the district court but challenged the grant of preliminary injunctive relief only on the procedural grounds that Section 504 does not create a private cause of action and that respondent had failed to exhaust his administrative remedies. See Brief for Appellants 5-27.

504 and to HEW's regulation governing auxiliary educational aids, 45 C.F.R. 84.44(d), the University suggested that auxiliary aids within the meaning of the regulation can appropriately be divided into two classes, durable and consumable.[4a] The University did not comment on the locus of financial responsibility under Section 504 for the provision of durable auxiliary aids. With respect to consumable aids, the University stated (App., *infra*, 3a-4a):

> If an applicant for *consumable* educational auxiliary aids does not have the financial resources equivalent to his/her projected need-based budget, the University will provide the funds necessary to insure that the student is not deprived of any educational opportunity due to the absence of auxiliary aids. In fact, financial assistance has been committed by the University this semester to assist in paying for a qualified deaf interpreter for another student.

Repeating the argument it had made in the district court, the University observed that the applicable HEW regulation, 45 C.F.R. 84.44(d), requires recipients of federal funds, not to provide auxiliary aids, but only to "take such steps as are necessary to ensure" that handicapped students are not excluded from federally funded educational programs due to the absence of auxiliary aids. The University stated that the regulation was drafted in this way to make clear that recipients of federal funds are not themselves required to provide auxiliary aids if such aids are available from other sources. The University then concluded (App., *infra*, 4a): "We are unaware of any qualification that states

---

[4a] The University defined durable aids as "those which, once provided, allow multiple use by successive classes of students. Such durable auxiliary aids include, among others, building modifications, ramps, taped texts and braille computer terminals" (App., *infra*, 2a). Consumable aids, in the University's lexicon, are "those expendable single-use services which are provided by an individual to a student on a one-on-one basis and, once provided, cannot be reused. Examples in this category include wheelchair attendants, deaf interpreters and individual readers" (*ibid.*).

the alternative provider may not be [the handicapped student himself], assuming he/she has adequate financial resources."

In January 1980, seven months after this Court's decision in *Davis* and shortly before the oral argument in the court of appeals in the present case, petitioners wrote to the clerk of the court of appeals (App., *infra*, 6a-8a) in order to call *Davis* to the court's attention. Even at that late date, petitioners did not argue that Section 504 does not require any expenditure of money by recipients of federal funds. Rather, they merely stated that the University was not required to provide an individual interpreter for respondent and that the University had already "taken all other necessary steps to accommodate [respondent's] handicap" (App., *infra*, 7a).

For the first time in their petition for rehearing in the court of appeals, petitioners adopted the extreme position they now press in this Court. We have reviewed the history of this controversy not to suggest that petitioners failed to preserve their point adequately in the courts below but rather to demonstrate that, both before and after *Davis*, petitioners assumed that compliance with Section 504 requires recipients of federal funds to bear some costs in appropriate circumstances. The Court recognized as much in *Davis*, and there is no basis for reexamination of this established interpretation of Section 504.

There is no doubt that Congress expected and intended that universities and other recipients of federal financial assistance would spend some of their money to accommodate qualified handicapped persons and thus prevent their exclusion from programs and activities supported by the federal government. Petitioners should not be permitted to prevail simply by arguing that any financial outlay by the University of Texas is an affirmative act and this Court said in *Davis* that Section 504 does not "impose an affirmative action obligation on all recipients of federal funds" (442 U.S. at 411). The evidence that

Congress intended at least some expenditures was recounted at length in the brief for the United States as amicus curiae in *Davis* (Br. 25-38, 44-55),[5] and we do not repeat that entire discussion here. We merely highlight some points and supplement the earlier treatment with information about the legislative antecedents of Section 504.

The forerunner of Section 504 was the so-called Humphrey-Vanik bill to amend Title VI of the Civil Rights Act of 1964. The proposal would have added "physical or mental handicap" to the list of personal characteristics designated by Title VI as impermissible bases for discrimination in federally funded programs. See H.R. 12154, 92d Cong., 1st Sess. (1971); S. 3044, 92d Cong., 2d Sess. (1972), reprinted in 118 Cong. Rec. 526 (1972).[6] The bill would have had substantially the same effect as Section 504.[7] In explaining the need for the legislation, both Representative Vanik and Senator Humphrey repeatedly emphasized that handicapped persons had been denied educational opportunity because of the absence of special services. 117 Cong. Rec. 45974 (1971) (remarks of Rep. Vanik); 118 Cong. Rec. 464, 1595, 4341-4342, 30390 (1972) (same); *id.* at 525, 9495 (remarks of Sen. Humphrey).

Representative Vanik acknowledged that the states had "plead[ed] lack of funds" (118 Cong. Rec. at 4341) and that providing equal educational opportunity to handicapped students would be "burdensome to the schools"

---

[5] We are supplying the parties with copies of the government's brief in *Davis*.

[6] The Humphrey-Vanik bill included an exception for those situations in which lack of a physical or mental handicap "is a bona fide qualification reasonably necessary to the normal operation of * * * [a federally funded] program or activity."

[7] Both Senator Humphrey and Representative Vanik spoke in support of Section 504 and expressed the understanding that Section 504 would effect the intent of their original bill. 118 Cong. Rec. 32310 (1972) (statement of Sen. Humphrey); 119 Cong. Rec. 18137 (1973) (remarks of Rep. Vanik).

(117 Cong. Rec. at 45975). Nevertheless, he insisted that handicapped persons are entitled to equal educational opportunity "as U.S. citizens" (*ibid.*). Senator Humphrey likewise recognized that the denial of equal educational opportunity did not necessarily result from prejudice but was frequently caused by "problems of transportation and architectural barriers" (118 Cong. Rec. at 525). But, Senator Humphrey said, whatever the explanation for the exclusion of handicapped persons, "the injustice of exclusion remains" (*ibid.*). These remarks by the cosponsors of the precursor to Section 504 show that, from the beginning, congressional consideration of proposed measures to bar discrimination against the handicapped in federally funded programs was informed by the realization that achievement of the legislative goal would cost money and that some of the financial burden might have to be borne by the institutions receiving federal funds.

The congressional expectation that recipients of federal funds would need to spend money in order to enable handicapped students to participate effectively in funded programs or activities is most clearly evidenced by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, Title I, 92 Stat. 2955 *et seq.* See generally the brief for the United States as amicus curiae in *Davis*, at 44-45. As already mentioned (see page 10, *supra*), Section 115(a) of the 1978 amendments authorized grants to states for the establishment and operation of comprehensive rehabilitation centers that "shall provide * * * to local governmental units and other public and private nonprofit entities located in the area such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with this Act, particularly the requirements of section 504." 29 U.S.C. (Supp. II) 775(a).

Congress also added several other provisions designed to improve the availability of auxiliary educational aids

for the handicapped and thus to ease the burden of compliance with Section 504. Interpretive services for the deaf were explicitly included among the auxiliary aids Congress had in mind. For example, Section 114(3) of the 1978 amendments authorized grants to assist public or private nonprofit organizations in establishing or operating 12 programs "[f]or the purpose of training a sufficient number of interpreters to meet the communications needs of deaf individuals." 29 U.S.C. (Supp. II) 774(d). Section 116(2) of the amendments authorized the Commissioner of the Rehabilitation Services Administration to make grants for the purpose of "establish[ing] within each State a program of interpreter services (including interpreter referral services) which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals." 29 U.S.C. (Supp. II) 777e. These statutory provisions evidence the congressional recognition that Section 504 imposes some financial obligation on recipients of federal funds. They also reflect the legislative commitment to help recipients meet their Section 504 responsibilities to handicapped persons. In presenting the conference committee report on the 1978 amendments to the full House of Representatives, one of the House conferees, Representative Jeffords, explained (124 Cong. Rec. H13473 (daily ed. Oct. 14, 1978)):

> As a result of Section 504 it has become clear to many that [Section 504] means more than just removing architectural barriers for the physically handicapped. While this is certainly a priority goal, there are many other types of disabilities to which 504 applies and to which attention must be paid. People who are deaf face communication barriers which are just as great as the architectural barriers faced by those in wheelchairs. * * * One of the biggest problems facing the deaf throughout the country is the lack of interpreters to allow them to function within a hearing society. Not only are there not

> enough interpreters, there are specifically not enough trained interpreters. The provision in this conference report will establish 12 interpreter-training centers and interpreter pools within each State and help to alleviate these problems and make section 504's nondiscrimination policies meaningful as well as applicable to them.

These remarks were made on the floor of the House moments before the House agreed, by a vote of 365-2, to accept the conference committee report (124 Cong. Rec. at H13476).

In addition to measures directly addressed to helping the deaf, the 1978 amendments included other provisions that reflect the congressional understanding that compliance with Section 504 may require monetary expenditures by recipients of federal funds. For example, Congress directed the Architectural and Transportation Barriers Compliance Board to report on "the amounts required to be expended by States and by political subdivisions thereof to provide handcapped [*sic*] individuals with full access to all programs and activities receiving Federal assistance." 29 U.S.C. (Supp. II) 792(h)(1). Congress authorized the Secretary of HEW to "provide, directly or by contract, financial assistance to any public or nonprofit agency, institution, or organization for the purpose of removing architectural, transportation, and communication barriers." 29 U.S.C. (Supp. II) 794b(3). Representative Jeffords was the author of these provisions. In describing them to the full House of Representatives, he carefully observed that, although Congress intended to assist recipients of federal funds in fulfilling their obligations under Section 504, those obligations are not dependent on the availability of federal grants earmarked for aid to the handicapped. Representative Jeffords stated (124 Cong. Rec. at H13474):

> On section 504 itself, the conferees accepted a provision that I offered calling for a study within each State to find out what the actual costs of implementing section 504 of this act will be. We keep

> hearing that section 504 is going to be so expensive to implement, but every time I or any other Member of Congress try to get money to carry out 504, somebody comes back to say that they do not know what the costs are and nobody has done a study. Hopefully, a study will be done in the next year and we should have the cost projections and answers we require. Another provision which I authored could be brought into effect and that would be to get the Federal Government to provide money to help States and localities implement section 504. I must emphasize so that there is no misunderstanding that my insistence that the Federal Government pay part of the costs is in no way to negate or minimize the removal of barriers for the handicapped, or in any way to halt or delay action until the Federal Government puts up some money. My goal is clear and it is to get the Federal Government, which made the law, which wrote the regulations to pay for at least part of the costs so that the full burden does not fall on the State or local governments or on public or private institutions throughout the country.

Finally, in another statute enacted 10 days before the 1978 Rehabilitation Act amendments, Congress expressly found and declared that "due to the rapid implementation of programs to assist handicapped individuals mandated under the Education for the Handicapped Act and section 504 of the Rehabilitation Act of 1973, there is a need for people to provide the special supportive services and removal of architectural barriers required by these Acts." 29 U.S.C. (Supp. II) 876(a)(1). To meet this need, Congress directed the Secretary of HEW to establish programs "which provide individuals with skills necessary to train or provide assistance to handicapped persons, including, but not limited to, interpreters for the deaf and aides in classrooms to assist in the education of the handicapped." 29 U.S.C. (Supp. II) 876(b). These provisions, both part of the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909, 1912, further show that Congress in-

terpreted Section 504 to require certain financial outlays by recipients of federal funds.[8]

Even without the foregoing strong indications of congressional intent, we believe that Section 504, standing alone, would be enough to establish that recipients of federal funds may be required to spend money in order to avoid discrimination against the handicapped in violation of the statute. That is precisely what this Court held in *Lau* v. *Nichols*, 414 U.S. 563 (1974), in the analogous context of a suit under Title VI of the Civil Rights Act of 1964. Section 601 of the Civil Rights Act, 42 U.S.C. 2000d, prohibits discrimination on the basis of "race, color, or national origin" in the same way that Section 504 prohibits discrimination on the basis of handicap. The statutory language of Section 601, like that of Section 504, does not specifically mention any financial obligation on the part of recipients of federal funds. Yet, on review of a local school district's failure to provide English-language instruction or a bilingual curriculum or some other form of assistance to enable Chinese-speaking students to participate effectively in a federally funded educational program, this Court found a violation of Section 601 and remanded "for the fashioning of appropriate relief" (414 U.S. at 569). Although the Court did not specify what kind of relief should be ordered, any effective form of relief obviously would have entailed at least some expense for the local school district, the recipient of federal funds.[9]

---

[8] Congress thought that the benefits of the Rehabilitation Act of 1973 would far exceed its costs. As the Senate Committee on Labor and Public Welfare observed in its report on the Act, handicapped persons trained to participate productively in society will contribute to the gross national product and will pay federal, state, and local taxes. At the same time, they will no longer be dependent on public assistance or private charity. See S. Rep. No. 93-318, 93d Cong., 1st Sess. 12 (1973).

[9] See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-436 (1971) (compliance with Title VII of the Civil Rights Act of 1964

If accepted, petitioners' contention that Section 504 never requires recipients of federal funds to spend any money in order to avoid excluding otherwise qualified handicapped persons from federally funded programs would signal the end of nearly all compulsory measures to aid the handicapped under Section 504. Recipients of federal funds would not have to build a single ramp to make campus buildings accessible to handicapped persons. They would not be required to modify a single bathroom so that it could be used by handicapped persons. They would not be obliged to undertake any effort at all to enable qualified handicapped persons to participate in federally funded programs, if that effort involved even the slightest identifiable expense. This cannot be what Congress intended when it passed Section 504. Whatever the Court concludes is the proper resolution of respondent's individual claim, it should decline petitioners' invitation to construe the statute in such a way as to drain it of nearly all practical impact.

II

THE SECRETARY OF HEW HAS REASONABLY AND CONSISTENTLY INTERPRETED SECTION 504 TO REQUIRE RECIPIENTS OF FEDERAL FUNDS TO ENSURE THE PROVISION OF AUXILIARY EDUCATIONAL AIDS TO OTHERWISE QUALIFIED DEAF STUDENTS, IRRESPECTIVE OF THE FINANCIAL NEED OF A PARTICULAR STUDENT

Once it is agreed that recipients of federal funds may be required to spend money in order to avoid the illegal exclusion of a handicapped person from a federally funded program or activity, difficult line-drawing questions inevitably arise. This Court suggested as much in *Davis* when it spoke of attaining the goal of enhanced educational and rehabilitation opportunities for the handicapped "without imposing undue financial and adminis-

---

may require employers to validate testing procedures by showing that they are a reasonable measure of job performance; such validation would undoubtedly entail some special expense).

trative burdens upon a State" (442 U.S. at 412). The Secretary of HEW, in issuing his Section 504 regulations in April 1977,[10] explicitly recognized the need to consider potential costs in determining which measures must be undertaken by recipients of federal funds in order to comply with Section 504. The Secretary stated (42 Fed. Reg. 22676 (1977) (emphasis added)):

> From the outset, the Department has recognized that the problem of ending discrimination on the

---

[10] Petitioners do not challenge the Secretary's authority to issue regulations governing the application of Section 504. Particularly after the adoption of the 1978 amendments to the Rehabilitation Act, such a challenge would be doomed to failure. The amendments added Section 505(a)(2) to the Act, 29 U.S.C. (Supp. II) 794(a)(2), and that provision makes the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" available for the enforcement of Section 504. Section 602 of the Civil Rights Act authorized and directed federal agencies extending federal financial assistance to effectuate the antidiscrimination provisions in Section 601 of the Act "by issuing rules, regulations, or orders of general applicability * * *." 42 U.S.C. 2000d-1. Even before the 1978 amendments made this legislative command expressly applicable to the enforcement of Section 504, Congress had made known its intention that the Secretary of HEW should issue regulations implementing Section 504. See S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974) (reprinted in brief for the United States as amicus curiae in *Davis*, at 36-37).

The Court in *Davis* did not quarrel with the Secretary's authority to promulgate regulations under Section 504. The Court stated, however, that, "[f]or the first three years after the section was enacted, HEW maintained the position that Congress had not intended any regulations to be issued" (442 U.S. at 412 n.11). The Court further stated that the agency "altered its stand only after having been enjoined to do so" (*ibid.*). The latter statement referred to the district court's ruling in *Cherry* v. *Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976). We know of no basis for the Court's remarks concerning HEW's perception of its obligations under Section 504. It is our understanding that issuance of the Section 504 regulations was delayed, not because HEW did not believe such regulations should be issued, but because development of the regulations was a difficult and time-consuming process. See 39 Fed. Reg. 18582 (1974); 41 Fed. Reg. 20296 (1976); and 41 Fed. Reg. 29548 (1976), all pre-dating the decision in *Cherry*.

> basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of nondiscriminatory treatment a difficult one.
>
> * * * * *
>
> These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation: Congress' mandate to end discrimination is clear. But it is also clear that *factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination* and to bring handicapped persons into full participation in federally financed programs and activities.

The regulations promulgated by HEW thus reflect a conscious effort to guarantee handicapped persons an equal opportunity to participate in federally assisted programs but at the same time to avoid the imposition of extremely expensive or impractical burdens on recipients of federal funds.[11] The particular regulation most rele-

---

[11] The pursuit of this dual objective is apparent in numerous portions of the HEW regulations. For example, the regulations do not require an employer to accommodate an otherwise qualified handicapped person who applies for employment, if the accommodation involved "would impose an undue hardship on the operation of" the employer's federally funded program. 45 C.F.R. 84.12(a). See also 45 C.F.R. 84.12(c); 45 C.F.R. Part 84, Appendix A, at 383 (describing factors to be considered in making "undue hardship" determination). Similarly, a recipient of federal financial assistance need not "make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons." 45 C.F.R. 84.22(a). The recipient is required only to operate its program in such a way that, "when viewed in its entirety, [the program] is readily accessible to handicapped persons." *Ibid.* This regulation was intended to provide sufficient flexibility "to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facili-

vant to the present case is 45 C.F.R. 84.44(d). It concerns the provision of so-called auxiliary aids in federally funded postsecondary education programs.[12] The regulation states (45 C.F.R. 84.44(d)(1)):

> A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity

---

ties." 45 C.F.R. Part 84, Appendix A, at 386. Small social service providers are specifically exempted from the accessibility requirement if compliance would require a significant alteration in existing facilities. 45 C.F.R. 84.22(c). Likewise, small social service providers are not required to provide auxiliary aids for qualified handicapped persons who seek to benefit from the providers' services, unless the provision of such aids "would not significantly impair the ability of the recipient to provide its benefits or services." 45 C.F.R. 84.52(d)(2).

[12] "Auxiliary aids" may include "taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions." 45 C.F.R. 84.44(d)(2).

The regulation explicitly states that "attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature" are not included among "auxiliary aids," as that term is used in 45 C.F.R. 84.44(d)(2). As HEW's *Guide to the Section 504 Self-Evaluation for Colleges and Universities* 41 (1978) explains:

> [T]he statement that institutions need not provide readers for personal use or study, or other devices or services of a personal nature, raises the distinction between "rehabilitation" and "traditional educational" services. * * * Section 504 is intended to open up traditional education to handicapped persons; it does not deal with the rehabilitation of the individual or with personal needs that are apart from the educational process. In this section on auxiliary aids, and throughout other parts of section 504 * * *, it may be easier to envision what is required of the institution if section 504 is viewed as a civil rights statute ensuring rights to equal educational opportunity, rather than a set of requirements addressing rehabilitative or personal needs of handicapped individuals.

> operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

See also 45 C.F.R. 84.4(b)(1)(iii) and (b)(2). As a condition of receiving federal financial assistance, the University of Texas expressly agreed to comply with "all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto" (A. 20).

Although petitioners argued to the contrary in the district court, they apparently now concede that the regulation does not permit recipients of federal funds to use "financial need" criteria in evaluating requests for auxiliary aids filed by otherwise qualified handicapped students. HEW has consistently interpreted its regulations in this way and, in fact, applied that interpretation in this very case, in investigating and attempting to resolve respondent's administrative complaint. In letters to the University of Texas and respondent reporting the results of the agency's investigation, HEW concluded that the University's reliance on a "financial need" standard as a basis for denying respondent's request for assistance violated Section 504 and 45 C.F.R. 84.44(d) (App., *infra*, 9a-16a). The agency stated (*id.* at 15a):

> [U]se of a financial needs criteria in determining whether the necessary aids will be provided to a sensory impaired handicapped student is in violation of [45 C.F.R. 84.44(d)(1)]. The financial status of a qualified handicapped student is not an acceptable criteria [*sic*] for determining whether necessary auxiliary aids will be provided.

Nothing in the comments appended to the regulation at the time of its issuance or in HEW's application of the regulation since April 1977 suggests that the phrase "take such steps as are necessary to ensure" was intended to authorize recipients of federal funds to refuse to provide auxiliary aids to otherwise qualified handicapped students, whenever those students do not satisfy the recipients' financial aid criteria. Rather, as the

agency explained in April 1977 in response to comments from colleges and universities expressing concern about the cost of compliance with the regulation, the requirement that recipients of federal funds ensure the provision of auxiliary aids can usually be met "by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations." 45 C.F.R. Part 84, Appendix A, at 392. Neither when the regulations were issued nor subsequently has HEW suggested in any way that handicapped students' own financial reserves are among the resources on which colleges and universities may draw in satisfying the auxiliary aid requirement. The administrative construction of the agency's own regulation is not "plainly erroneous" or "demonstrably irrational," and it is therefore entitled to conclusive weight. See, *e.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-566 (1980); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League*, 423 U.S. 12, 14-15 (1975); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 276 (1969); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945).

The remaining question, then, is whether 45 C.F.R. 84.44(d) goes beyond the authority of Section 504 in requiring recipients of federal funds for postsecondary education programs to ensure the provision of auxiliary aids for otherwise qualified handicapped students, irrespective of "financial need" considerations. This Court has held that the validity of a regulation promulgated under a general statutory authorization (see note 10, *supra*) "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe* v. *Housing Authority of Durham*, *supra*, 393 U.S. at 280-281. See also *Lau* v. *Nichols*, *supra*, 414 U.S. at 571 (Stewart, J., concurring in the result); *American Trucking Ass'ns* v. *United States*, 344 U.S. 298 (1953). Moreover, the Court has

frequently recognized that the formal regulations and consistent administrative construction of an agency charged with the responsibility for implementing a statute are "entitled to great weight." *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 1 (1965). We submit that 45 C.F.R. 84.44(d) satisfies the standard of review established by this Court and should be upheld.

We emphasize first that the regulation, like all the regulations promulgated under Section 504 and the statute itself, applies only to "otherwise qualified" handicapped persons. Here, the parties stipulated that respondent is a qualified handicapped person within the meaning of Section 504 (A. 30). And, of course, respondent's qualifications for the master's degree program in which he was enrolled at the University of Texas have been amply demonstrated by his successful completion of that course of study. The present controversy is thus unlike the dispute in *Davis*, where the Court found that the handicapped person seeking admission to a college nursing program was not "otherwise qualified" to participate in that program.

As the discussion at the beginning of this portion of the brief implies (see pages 20-22, *supra*), we acknowledge that the costs imposed by a given regulation are a factor that may legitimately be considered by a reviewing court in determining whether the regulation is reasonably related to the purposes of Section 504. Unfortunately, the record in the present case contains woefully little information concerning the financial burden attributable to 45 C.F.R. 84.44(d). This deficiency exists in part because petitioners chose not to contest the validity of the regulation in the district court and in part because the case comes to this Court in the procedural posture of an appeal from the grant of preliminary injunctive relief. We think, however, that the available data do tend to support the proposition that, particularly as applied to the provision of sign-language interpreters for deaf stu-

dents, 45 C.F.R. 84.44(d) is a reasonable measure designed to advance the purposes of Section 504.

In the first place, the contemporaneous comments of HEW, as well as later guidance from the agency to colleges and universities, show that HEW specifically considered the expense factor before deciding to adopt 45 C.F.R. 84.44(d). Because the agency anticipated that auxiliary educational aids could, in most instances, be obtained by handicapped students from sources other than their schools, and because colleges and universities were granted a large measure of discretion in determining what aids to provide and how to provide them, HEW concluded that the regulation would not impose an extremely expensive or impractical burden on recipients of federal funds. As mentioned previously (see page 24, *supra*), HEW advised postsecondary schools that their obligations under the regulation usually could be met through the use of "existing resources * * * such as state vocational rehabilitation agencies and private charitable organizations." 45 C.F.R. Part 84, Appendix A, at 392. The agency elaborated (*ibid.*):

> [T]he Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.
>
> As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times.

HEW substantially repeated these comments in its *Guide to the Section 504 Self-Evaluation for Colleges and Universities* 40 (1978).[13] In fact, in fiscal year 1978, the federal government awarded more than 760 million dollars to state vocational rehabilitation agencies for services for the handicapped, including sign-language interpreters. See HEW's *Annual Report to the President and the Congress on Federal Activities Related to the Administration of the Rehabilitation Act of 1973* 151 (1978). Texas alone received more than 47 million dollars in federal grants for these purposes. *Id.* at 152.[14]

Several other federal programs also offer assistance that may be used to furnish students with auxiliary aids,

---

[13] The guidebook stated that, in adopting 45 C.F.R. 84.44(d), HEW

> intended for colleges and universities to meet their obligations by assisting students in the use of already existing resources for auxiliary aids, such as State Vocational Rehabilitation agencies and private charitable organizations. Through a liaison with such agencies and organizations, the institution should be able to, in most instances, make auxiliary aids available to its students at no expense to the institution.

[14] Respondent's application for vocational rehabilitation services was denied on the ground that he did not have a substantial employment handicap (A. 12). The validity of that determination is not at issue here.

The American Council on Education asserts in its brief as amicus curiae (Br. 13) that, in actual practice, state vocational rehabilitation agencies have denied auxiliary aids to postsecondary students in reliance on the "similar benefits" provision of the Rehabilitation Act of 1973, which requires vocational rehabilitation agencies to provide services only "after full consideration of eligibility for similar benefits under any other program." 29 U.S.C. 721 (a)(8). However, in 1977, HEW's Rehabilitation Services Administration issued an interim policy statement advising vocational rehabilitation agencies that the "similar benefits" provision, by itself, should not preclude the provision of auxiliary aids to postsecondary students who are otherwise eligible for assistance. And, more recently, in *Jones v. Jeffers*, Civ. No. 79 C 5396 (N.D. Ill. Jan. 12, 1981), the district court held (slip op. 13-16) that the "similar benefits" provision is not a permissible basis for denying assistance to all students attending postsecondary institutions, because uni-

including sign-language interpreters. The Department of Education's Office of Handicapped Concerns recently listed seven such programs in a publication designed to assist educational institutions in locating sources for educational aids. *Auxiliary Aids: A Resource Guide for Postsecondary Schools, Rehabilitation Agencies, and Handicapped Individuals* (1980).[15] In addition, of course, recipients of federal funds may seek assistance from private charitable organizations or from students willing to volunteer their time. And, in some circumstances, measures entailing little, if any, cost may insure effective instruction. For example, not every student with a hearing impairment needs a sign-language interpreter for effective instruction, and even those who generally need an interpreter may not need one for every course. Accordingly, we agree with the American Council on Education (Br. 27) that in some circumstances, provision of notetakers, access to instructor's lecture notes, or special tutoring may be adequate to insure effective instruction for hearing-impaired students.[16]

---

versities do not operate rehabilitation programs, and only programs of this kind are covered by the phrase "similar benefits" as used in the Rehabilitation Act. The Department of Education believes that the decision in *Jones* reflects the correct interpretation of the Rehabilitation Act of 1973. If there should be any change in the Department's policy in this regard, we will, of course, promptly inform the Court.

[15] These programs are (1) the Special Services for Disadvantaged Students Program, 20 U.S.C. 1070d-1(b)(3); (2) the Regional Postsecondary Education Programs for Deaf and other Handicapped Persons, 20 U.S.C. 1424a; (3) the Cooperative Education Programs, 20 U.S.C. 1133 *et seq.*; (4) the College Work-Study Program, 42 U.S.C. 2751 *et seq.*; (5) the Community Service and Continuing Education Program—Special Projects, 20 U.S.C. 1005a; (6) the Fund for Improvement of Postsecondary Education, 20 U.S.C. 1221d; and (7) the Educational Opportunity Centers, 20 U.S.C. 1070d-1(b)(4).

[16] Contrary to the American Council on Education's contention, however, the lower courts in the present case did not err in failing to determine whether such alternatives would insure effective in-

The average annual expense that would actually be incurred by a college or university in providing a sign-language interpreter for a deaf student is not established by the record. We know, however, that respondent paid $1,245 for an interpreter to assist him in nine courses (A. 32). Unless the University of Texas follows a schedule significantly different from most postsecondary institutions, we can reasonably assume that nine courses represent nearly a full year's work for a fulltime student. The American Council on Education, on the other hand, cites (Br. 28 & n.18) a California State University study that allegedly shows that the annual cost of interpreter services for a fulltime deaf student is approximately $4,000. But, even if this higher figure is accurate, the amount still pales by comparison to the total amount of federal financial assistance given to postsecondary educational institutions.

A critical consideration in assessing the relationship between the Secretary's regulations and the purposes of Section 504 is that all the regulatory requirements, including in particular the auxiliary aid requirements in 45 C.F.R. 84.44(d), have been imposed only as a condition of the receipt of federal funds. The burden that can effectively be imposed by such regulations is limited by the amount of federal aid to which the regulations are tied. To the extent, therefore, that petitioners mean to attack the Secretary's regulations as unduly expensive, their argument disregards the fact that the University of Texas, like other colleges and universities, is free to decline federal aid if the benefits to be derived from that aid do not outweigh the costs associated with it. When a university receives $31,000,000 in federal assistance, as the University of Texas did in 1978 (A. 32), it is

---

struction for respondent. The parties stipulated that respondent needed a sign-language interpreter for effective instruction (A. 31). Moreover, the district court's order expressly gave petitioners the option of providing a sign-language interpreter or "other effective method of making orally delivered course materials available to [respondent]" (Pet. App. A-22).

difficult to understand how the school can argue, on financial grounds, that the requirement of ensuring the provision of a sign-language interpreter for a qualified deaf student is not reasonably related to the purposes of Section 504.[17]

This Court need not now decide whether it would also have been consistent with the purposes of Section 504 for the Secretary to promulgate a regulation stating that recipients of federal funds need not provide auxiliary educational aids to qualified handicapped students if those students fail to satisfy reasonable financial need criteria. That question is not before the Court. Whether or not such a regulation would have been a reasonable policy choice, the Secretary elected not to follow that path. There were several reasons for this decision. First, it would have meant that some handicapped students wishing to participate in federally funded programs would have been forced to bear a special financial burden solely on the basis of their handicap. Second, it would have required the Secretary to monitor the financial need criteria employed by all recipients of federal funds to make certain that they were reasonable and were not being used unfairly to exclude qualified handicapped students. This arguably would have involved a more serious intrusion into the affairs of colleges and universities than is contemplated by 45 C.F.R. 84.44(d). Third, by permitting different schools' financial aid criteria to determine the availability of auxiliary educational aids for certain handicapped students, the Secretary would have created a lack of uniformity in the administration of Section 504 that could easily have resulted in restricting the educational choices effectively available to handicapped students. Solely because of a student's handicap, he or she

---

[17] The record does not disclose whether the University of Texas received federal assistance that could have been used directly to provide a sign-language interpreter for respondent. The record also does not reveal whether petitioners explored the possibility of obtaining aid for respondent from private organizations or student volunteers.

might have been influenced to attend a particular school where auxiliary aids would be provided or to pursue a particular course of study in which the university's refusal to provide auxiliary aids would not have such serious financial consequences.

To avoid these problems, and for reasons of administrative convenience, the Secretary rejected the possibility of incorporating a financial need test in his regulations and instead adopted the approach reflected in 45 C.F.R. 84.44(d). The provisions of that regulation are reasonably related to the fundamental purpose of Section 504, *i.e.*, preventing the exclusion of qualified handicapped persons from federally funded programs. At least in the absence of some greater showing that the regulation imposes excessive burdens on the recipients of federal funds, there is no justification for refusing to enforce the regulation in this case. The court of appeals therefore correctly affirmed the district court's award of preliminary injunctive relief.[18]

---

[18] In their briefs as amici curiae, the American Council on Education (Br. 28-29) and the Equal Employment Advisory Council (Br. 27-28) cite *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 72 (1977), for the proposition that any accommodation of handicapped students involving more than minimal costs would impose an undue hardship. The issue in *Hardison* was the extent to which employers are required, under Title VII of the Civil Rights Act of 1964, to accommodate the religious preferences of employees. *Hardison* is an inapposite precedent because, unlike Title VII, Section 504 applies only to recipients of federal funds, and it requires accommodations based on handicap rather than religion. Under its delegated power to spend for the general welfare, Congress may reasonably require voluntary recipients of federal tax dollars to spend money to comply with federal laws that protect the handicapped. The religious accommodations at issue in *Hardison* could not have been justified under this "spending power" rationale. Moreover, the accommodations required by the court of appeals in *Hardison* were made necessary by the employee's voluntary religious choice; they would have impinged on his fellow employees and on a valid seniority system. 432 U.S. at 80-83. Respondent and other handicapped persons do not ordinarily choose to be disabled, and the provision of auxiliary educational aids in the University of Texas' master's degree program would not implicate the Establishment Clause or impinge directly on any other student.

CONCLUSION

The judgment of the court of appeals should be affirmed.[19]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING L. GORNSTEIN
Attorneys

FEBRUARY 1981

---

[19] Petitioners also ask this Court to decide whether Section 504 creates a private right of action. The Court need not reach that question, however, because respondent's suit was properly brought under 42 U.S.C. 1983. *Maine* v. *Thiboutot*, No. 79-838 (June 25, 1980). Should the Court nevertheless address petitioners' second question, it should hold that Section 504 does authorize enforcement through private litigation. The reasons for this conclusion are stated in the brief for the United States as amicus curiae in *Davis* (Br. 68-76) and in the briefs for the federal respondents in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) (Br. 35-40; Reply Br. 14-15). (We are providing the parties with copies of the government's briefs in *Cannon* as well as the brief in *Davis*.) This Court's decision in *Cannon* provides strong—indeed, we believe, dispositive—support for the view that Section 504 does impliedly create a private right of action.

Petitioners further ask the Court (Br. 16-18) to consider whether the "program or activity" in which respondent participated received federal financial assistance and therefore was subject to the antidiscrimination provisions in Section 504. This question was not raised in the courts below and is not properly before the Court. Because this case is here at the preliminary injunction stage, the "program or activity" question can be fully explored during further proceedings in the district court.

APPENDIX

[SEAL]

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
Austin, Texas 78712

President

January 15, 1979

Mr. Miles Schulze, Director
Post-Secondary Education Division
Office of Civil Rights
Department of Health, Education and Welfare
1200 Main Tower Biulding
Dallas, Texas 75202

Dear Mr. Schulze:

I am writing to acknowledge your letter of December 20, 1978, regarding the complaint filed by Mr. Walter Camenisch (Camenisch vs. University of Texas, #065370041) alleging discrimination on the basis of handicap under jurisdiction of Section 504 of the Rehabilitation Act of 1973. Your letter was received in my office on January 4, 1979. In accordance with the January 5, 1979 telephone communication between our offices, please accept the following as a timely response to your request for data and information relevant to this complaint.

With regard to your early complaint resolution procedure, the issues involved in this complaint have been thoroughly explored by the University and Mr. Camenisch through our internal procedures and, as witnessed by the fact that Mr. Camenisch has filed a civil suit in the U.S. District Court for the Western District of Texas, we have not been able to arrive at a mutually agreeable solution. Unless you have new information to the contrary, we do not believe a voluntary resolution of the issues by the parties is feasible.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, states:

> No otherwise qualified individual in the United States as defined in Section 7(6) shall solely be reason of his handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The regulations promulgated pursuant to Section 504 under Section (d), Auxiliary Aids, of Section 88.44, Academic Adjustments, state:

> (1) A recipient . . . shall take *such steps as are necessary to insure* that no handicapped student is . . . subjected to discrimination under any educational program . . . because of the absence of educational auxiliary aids . . . (emphasis added).

Thus, both the statute and the regulations charge institutions of higher education to take appropriate steps to insure that all of their educational programs are accessible to qualified handicapped students.

Auxiliary aids as defined in the regulations (§ 88.44 (d) (2)), fall into two distinct categories. First, *durable* auxiliary aids are those which, once provided, allow multiple use by successive classes of students. Such durable auxiliary aids include, among others, building modifications, ramps, taped texts and braille computer terminals. The second category, *consumable* auxiliary aids, represent those expendable single-use services which are provided by an individual to a student on a one-on-one basis and, once provided, cannot be reused. Examples in this category include wheelchair attendants, deaf interpreters and individual readers.

With regard to the complaint filed by Mr. Camenisch it is acknowledged that he is a deaf student at The University of Texas at Austin and that he has a need for the services of a qualified interpreter. It is further acknowledged, both in your letter and by Mr. Camenisch, that he has provided for such interpreter services from his personal funds during his graduate studies at the

University. Thus, at the outset, it is established that Mr. Camenisch has not been excluded from participation in, denied the benefits of or subjected to discrimination under any of the educational programs in our graduate school.

When an individual such as Mr. Camenisch requests the University to provide auxiliary aids of the *consumable* type described above, it is the position of the University that our responsibilities and obligations under Section 504 (and the regulations issued pursuant to it) require the University "to take such steps as are necessary *to insure*" that no handicapped student is denied any educational benefit as a result of a lack of educational auxiliary aids. The specific steps we take to make this determination involve having our Financial Aid Office conduct a financial needs assessment employing the same criteria mandated for most Federal student aid. Once a budget has been established using these criteria, the full cost related to the educational auxiliary aid service is added to arrive at a final budget. Employing these criteria at the time of his request, Mr. Camenisch's academic year need-based budget is $6,900 which includes an add-on supplement of $1,350 for the services of a qualified deaf interpreter (this supplement was calculated using rates of pay and estimated hours of service needed as supplied by Mr. Camenisch.) The actual annual income of Mr. Camenisch and his spouse was greater than $23,000, a sum which is substantially in exess of the financial resources required to insure full access to our educational programs. By means of this analysis we have taken all appropriate and necessary steps to insure that Mr. Camenisch is not being denied any educational opportunity due to the absence of an educational auxiliary aid. Thus, with respect to Mr. Camenisch, the University is in full compliance with Section 504 and the accompanying regulations. If an applicant for *consumable* educational auxiliary aids does not have the financial resources equivalent to his/her projected need-based

budget, the University will provide the funds necessary to insure that the student is not deprived of any educational opportunity due to the absence of auxiliary aids. In fact, financial assistance has been committed by the University this semester to assist in paying for a qualified deaf interpreter for another student.

Obviously, this specific complaint raises a much broader question regarding the obligations of institutions of higher education under Section 504 with respect to the provision of consumable educational auxiliary aid services. Stated succinctly, are institutions of higher education required to fund all expenses for all consumable auxiliary aids upon demand; that is, does Section 504 provide an open-ended entitlement to each and every handicapped student requesting auxiliary aids? Or, in the alternative, are institutions of higher education required under Section 504 *to insure* that there is no discrimination due to the absence of auxiliary aids? We understand that there is a draft Policy Interpretation No. 7 for Section 504 that proposes specifically to prohibit institutions of higher education from using a financial means test even when considering the provision of *consumable* educational auxiliary aids. In our opinion such an interpretation would not be consistent with Section 504. The drafting history of both the statute and the regulations is replete with references that higher education can usually meet their obligations to provide auxiliary aids through existing resources of other groups. We are unaware of any qualification that states the alternative provider may not be the recipient, assuming he/she has adequate financial resources. Furthermore, any interpretation that requires the University to provide auxiliary aids without regard to other sources could seriously jeopardize the eligibility of handicapped students to receive aid from State vocational rehabilitation agencies. Once an institution, using legitimate criteria, has established the availability of educational auxiliary aids for a specific individual and thus has insured that

the individual will not be deprived of any educational benefit due to the absence of auxiliary aids, the obligations of an institution of higher education under Section 504 should cease. To require institutions such as UT Austin to divert public funds to provide educational auxiliary aids to individuals who have no financial need represents at best an irresponsible use of public funds, it could well jeopardize other important educational programs that would be of benefit to all students and, perhaps most importantly, it will not further the objectives of Section 504 in any way.

In summary, it is our firm conviction that a reasonable financial means analysis represents a legitimate method to insure the absence of discrimination with regard to consumable educational auxiliary aids, and that any interpretation to the contrary represents an unwarranted extension of Congressional intent with regard to Section 504.

If we can provide you with any additional information, or if you would like to discuss any of the issues raised by this letter, please do not hesitate to contact my office. We stand ready to assist you in any way we can.

Sincerely yours,

/s/ Lorene L. Rogers
LORENE L. ROGERS
President

LLR/cs

[SEAL]

THE ATTORNEY GENERAL OF TAXES

January 21, 1980

Honorable Gilbert F. Ganucheau
Clerk
United States Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 78-2191; Walter Camenisch v.
The University of Texas, et al.

Dear Mr. Ganucheau:

The notice of scheduling of cases which I received on the *Downing* case included the above styled case among those to be argued at the same week. While I have not received a specific notice on that case; therefore, it appeared advisable to inform the Court of intervening cases on the *Camenisch* issues, and they are set forth below.

1. *Southeastern Community College* v. *Davis*, —— U.S. ——, 99 S.Ct. 2361 (1979). This case is the first case decided by the United States Supreme Court interpreting Section 504 of the Rehabilitation Act of 1973. The Supreme Court held in *Davis* that universities were not compelled by the Rehabilitation Act of 1973 to undertake affirmative action in modifying post-secondary educational programs to accommodate handicapped persons. In so holding, the court ruled that Section 504 did not compel the University to provide individual supervision for *Davis* and further ruled that an interpretation of the regulations requiring extensive modifications would raise grave doubts about the validity of such regulations. Defendants contend that there is very little difference between requiring the University of Texas to provide an individual interpreter for *Mr. Camenisch* and the require-

ment for providing *Davis* individual supervision. The latter requirement was, of course, struck down by the Supreme Court. Defendants contend that they have taken all other necessary steps to accommodate *Mr. Camenisch's* handicap.

2. *Cannon* v. *University of Chicago, et al.*, —— U.S. ——, 99 F.Ct. 1946 (1979). This case concerned the jurisdictional question of a private cause of action under Title IX. Defendants contend that it does not apply to private causes of action under Section 504, but bring it to the Court's attention because it did concern the implications of a private cause of action arising under Title VI. Defendants contend that the instant case and *Cannon* can easily be distinguished. In the instant case the very question before the Court involves an interpretation of H.E.W. regulations. In *Camenisch* that agency was never given an opportunity to rule on the regulations before court action was sought. While Defendants contended that there is no private cause of action under Section 504 and would reiterate that the Supreme Court specifically failed to rule on this question in *Davis*, Defendants have alternatively contended that if there is such a private cause of action at the very least exhaustion of the agency's administrative requirements is required. Appellees, therefore, do not believe that *Cannon* is authority for the proposition that there is a private cause of action available in this case.

Defendants, who are Appellees in this cause of action, feel they have a duty to advise the Court that *Mr. Camenisch* has completed the degree program in which he was enrolled at the time of the issuance of the injunction complained of herein, and has not sought reenrollment at the University of Texas.

Your courtesy in allowing the parties to bring intervening cases to the Court's attention is greatly appreciated.

Sincerely,

Martha H. Allan
Assistant Attorney General

MHA:jm

cc: Mr. Marc P. Charmatz
Mr. Sy Dubow
NATIONAL ASSOCIATION
OF THE DEAF LEGAL
DEFENSE FUND
7th Street & Florida
Aves., N.E.
Washington, D.C. 20002
(certified)

Mr. Charles Smith
812 San Antonio,
Suite G-11
Austin, Texas 78701
(certified)

Mr. Walter W. Barnett
Deputy Chief,
Appellate Section
DEPARTMENT OF JUSTICE
Constitution & 10th Streets
Washington, D.C. 20530

Ref: #780041
#792062

Dr. Peter T. Flawn
President, University of Texas at Austin
Office of the President
Austin, Texas 78712

Subject: *Camenisch* v. *University of Texas at Austin*

Dear Mr. Flawn:

This is to advise you that we have completed our investigation of the individual and class-type complaints filed by the National Association of the Deaf Legal Defense Fund under the jurisdiction of Section 504 of the Rehabilitation Act of 1973, on behalf of Mr. Walter Camenisch and other deaf graduate students at the University of Texas at Austin (UTA).

The issue raised in this complaint is that Mr. Camenisch, as well as other deaf graduate students, is subjected to discrimination under the educational program operated by UTA because of the absence of educational auxiliary aids for graduate students with impaired sensory or speaking skills.

Mr. Camenisch filed a civil suit in the U.S. District Court for the Western District of Texas on March 8, 1978. A Preliminary Injunction was issued and the Court ordered that the action be stayed, pending a final HEW administrative determination. Mr. Camenisch was required by the Court to initiate a complaint with our office.

An on-site investigation was conducted by Dr. Marta Olchyk, March 19-21, 1979. Based on the results of that investigation, we have concluded that the University is in violation of Section 504 of the Rehabilitation Act of 1973 by failing to provide educational auxiliary aids to students with impaired sensory skills, thus denying handicaped students equal educational opportunities.

We have also determined that UTA is in violation of Section 504 of the Rehabilitation Act of 1973 by:

(a) Failure to include handicapped students or their representative organizations in the meetings held by the Committee for the Handicapped.

(b) Failure to maintain adequate records of the meetings held by the Committeed for the Handicapped.

(c) Failure to make accessible data pertinent to this complaint to the investigator during the on-site investigation.

45 C.F.R. 84.44(d) provides:

> "Auxiliary aids: (1) A recipient to which this subpart applies shall take such steps as necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under any educational program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills."

Our investigation revealed that Mr. Camenisch is a qualified handicapped individual as defined by the implementing regulation of Section 504 of the Rehabilitation Act of 1973. Mr. Camenisch, as well as other deaf graduate students, requested that UTA provide funds for the payment of a qualified interpreter for the purpose of assuring them full participation in classes at that institution. We have determined that the requested interpreter services were necessary for Mr. Camenisch to fully participate in the educational program in which he was enrolled. Mr. Camenisch was denied such services verbally and in writing by the UTA administrators. The basis cited for the denial was the University's financial needs criteria. 45 C.F.R. Section 84.6(c)(1) provides that:

> "A recipient shall, within one year of the effective date of this part (i) evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and the effects thereof that do not or may not meet the requirements of this Part: (ii) modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and (iii) take, after consultation with handicapped persons appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices."

Our investigation revealed that the Committee for the Handicapped neither included, nor sought assistance from handicapped persons or organizations representing students with impaired sensory, manual or speaking skills, even though Mr. Camenisch, as well as others took their concerns regarding free interpreter services, to several officials at UTA. This is found in violation of the above quoted paragraph of Section 504 of the Rehabilitation Act of 1973.

Section 84.6(c)(2) requires:

> "A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(i) of this section maintain on file, make available for public inspection, and provide to the Director upon request: (ii) a description of areas examined and (iii) a description of any modifications made and of any remedial steps taken."

Our investigation revealed that the Committee for the Handicapped chaired by Dr. Donald Brown, which has met formally on several occasions, was unable to provide us with any written record regarding agenda or topics discussed, specific issues or recommendations as a result of these meetings.

This is found in violation of the above quoted paragraph of Section 504 of the Rehabilitation Act of 1973.
Because of the cited violations found to exist at UTA, the Office for Civil Rights is requesting you to develop and submit to our office a specific plan within 15 working days of the date of this letter which will correct these violations.

At a minimum, the plan must include the following:

—Reimbursement to Mr. Walter Camenisch for expenses incurred in order to acquire interpreter services during the duration of his class work at the University of Texas at Austin. The amount claimed in court by the complainant on May 19, 1979, totaled $1,245.00. If any further expenses were incurred by Mr. Camenisch after this date in the provision of interpreter services, it should be reimbursed as well.

—Specific guidelines for the maintenance of adequate records of meetings, recommendations, and remedial steps to be taken by the Committee for the Handicapped individuals.

—Appropriate and continuing steps to notify all students and applicants of the University's obligations under Section 504 to provide auxiliary aids to graduate students with impaired sensory skills.

—Enlistment, in the Committee for the Handicapped, of handicapped persons with impaired sensory, manual or speaking skills, or organizations representing such persons. A list of the members of this new Committee should be included in the plan to be forwarded to our office.

Please be assured that we will give you all the cooperation needed to help solve the issues voluntarily. Nevertheless, our Regulations stipulate that failure to correct the violations found may lead to enforcement proceedings with a risk of losing Federal funding.

Questions related to this matter should be addressed to our Postsecondary Education Division at (214) 767-3985.

Sincerely,

/s/ Taylor D. August
TAYLOR D. AUGUST
Director, Region VI

bcc:

D/HEW/Wash-Reading
PED-Reading
Official/PRMS
PHughes-Exec. Secretariat -OCR-HQ
OCR/PED/EOS-Olchyk/tg:1/23/80

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGIONAL OFFICE
1200 Main Tower Building
Dallas, Texas 75202

January 24, 1980

Office For Civil Rights
Ref: # 780041
#792062

Mr. Marc P. Charmatz
Litigation Attorney
The National Association of the Deaf
Legal Defense Fund
P.O. Box 1793
7th Street & Florida Avenue, N.E.
Washington, D.C. 20002

Subject: *Camenisch* vs. *University of Texas at Austin*

Dear Mr. Charmatz:

The investigation of the allegations against the University of Texas at Austin (UTA) raised by Mr. Walter Camenisch has been completed. Our findings are directed to you since Mr. Camenisch has designated you as his legal representative.

An on-site investigation was conducted by Dr. Marta Olchyk on March 19-21, 1979. Based on the results of that investigation, we have concluded that UTA is in violation of Section 504 of the Rehabilitation Act of 1973 by failing to provide educational auxiliary aids to students with impaired sensory skills, thus denying handicapped students equal educational opportunities.

Our investigation revealed that Mr. Camenisch is a qualified handicapped individual as defined by the implement-

ing regulation of Section 504 of the Rehabilitation Act of 1973. Mr. Camenisch, as well as other deaf graduate students, requested that UTA provide funds for the payment of a qualified interpreter for the purpose of assuring them full participation in classes at that institution. We have determined that the requested interpreter services were necessary for Mr. Camenisch to fully participate in the educational program in which he was enrolled. Mr. Camenisch was denied such services verbally and in writing by the UTA administrators. The basis cited for the denial was the University's financial needs criteria.

45 CFR, Section 84.44(d) of the Regulations implementing Section 504 of the Rehabilitation Act of 1973 provides:

> Auxiliary Aids: (1) A recipient to which this subpart applies shall take such steps as necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under any educational pogram or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.

Therefore, use of a financial needs criteria in determining whether the necessary aids will be provided to a sensory impaired handicapped student is in violation of the above quoted paragraph. The financial status of a qualified handicapped student is not an acceptable criteria for determining whether necessary auxiliary aids will be provided.

Based on the above, our office requested that UTA develop and submit to us a specific plan which will correct this violation within 15 working days of the date of this letter.

A copy of the letter of findings sent to UTA will be made available to you upon request.

We would like to thank you and Mr. Camenisch for the cooperation provided to us while conducting this investigation. You will be informed of the status of the case.

Sincerely,

/s/ Taylor D. August
TAYLOR D. AUGUST
Director, Region VI

cc. Walter Camenisch

Dated 11/19/80

Mr. Robert Giddings, Esq.
Office of General Counsel
The University of Texas System
201 West 7th Street
Austin, TX 78701

RE: *Camenisch* v. *The University of Texas at Austin*, OCR Docket Nos. 06780041 and 06792062

Dear Mr. Giddings:

I am writing pursuant to our telephone conversation of November 9, 1980 concerning administrative enforcement of the above-captioned complaints. As you know, those complaints were filed on behalf of, respectively, Mr. Walter Camenisch, at the time a deaf graduate student at the University of Texas at Austin, and a class of deaf or hearing impaired students at the University. The complaints were filed subsequent to a Federal district court order enjoining the University to provide interpreter services for Mr. Camenisch under Section 504 of the Rehabilitation Act of 1973.

The district court's injunction was upheld by the U.S. Court of Appeals for the Fifth Circuit. Recently, however, the U.S. Supreme Court granted the University's petition for a writ of *certiorari;* a decision by the Court on the merits is expected this term. It is my understanding that the Supreme Court will review all questions presented by the University on appeal, including the obligation of postsecondary institutions to provide interpreter services to deaf students under Section 504. Because of the scope of this review, the Office for Civil Rights will defer administrative action on the above complaint pending the outcome of the appeal.

Sincerely,

Antonio J. Califa
Deputy Assistant Secretary
Office of Litigation,
Enforcement and Policy

cc: Cynthia G. Brown
Taylor August
Joan Sessoms

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 338484 265